For discussion
on 17 January 2011

Bills Committee on Competition Bill

Responses to Follow-up Questions Arising From the Meeting on 20 December 2010

Purpose

This paper responds to questions raised by Members at the meeting on 20 December 2010.

Appointment of Commission member with experience in small and medium enterprises (SMEs)

2. The Administration proposed in the public consultation paper "Detailed Proposals for a Competition Law" issued in May 2008 that "at least one Commission member should have experience in SME matters". The policy intention of this proposal is that through appointing people with expertise and experience in SMEs as Commission members, the future Competition Commission would be able to better take into account the views and concerns of local SMEs while enforcing the new law, thereby facilitating compliance by SMEs. To reflect this policy intention, we have included "expertise or experience in SMEs", in addition to "expertise or experience in industry, commerce", in section 2(2) of Schedule 5 of the Competition Bill (the Bill) as one of the relevant qualifications to be taken into account by the Chief Executive (CE) in making appointment of Commission Members. We do not consider including an express provision stipulating "at least one Commission member should have experience in SME matters" necessary. The present formulation strikes a good balance between reflecting our policy intention as well as the need for sufficient flexibility under the appointment mechanism.

Possible manipulations in respect of the relevant turnover for the calculation of pecuniary penalty

3. To ensure that the future cross-sector competition law will be able to effectively combat all types of anti-competitive conduct and deter infringing undertakings from engaging in any prohibited conduct, it is important to provide for adequate sanctions as a maximum penalty under the Bill to cater for infringements of varying seriousness and gravity. We consider that linking the maximum pecuniary penalty to the infringing undertaking's turnover in Hong Kong would severely undermine the future Competition Tribunal's (Tribunal) capability to duly apply this remedy to produce sufficient deterrent effect, especially so for infringements involving multi-national corporations whose revenue earned from activities in Hong Kong may only constitute a minor portion of their total turnover. We wish to emphasize that as with the practice in other competition jurisdictions, the starting point of determining the penalty would be the local turnover. Only when this is inadequate to reflect the seriousness of the infringement would the Tribunal consider imposing a higher penalty. When we argued that our proposed approach could safeguard against possible manipulations through corporate restructuring or accounting methods in the booking of turnover, we were not referring to any specific forms of manipulations but we are aware that corporate restructuring and accounting practices in the business world are often complex and innovative.

4. The following hypothetical example may help demonstrate the deficiencies of linking the maximum pecuniary penalty to local turnover. Suppose a group of retailers for a particular product which together account for the substantial part of the relevant market have engaged in a market allocation agreement, according to which some of the retailers will focus on the Hong Kong market only whilst the others on the Shenzhen market. The agreement will undoubtedly have an appreciable adverse effect on competition in Hong Kong and therefore contravenes the proposed first conduct rule. If the maximum pecuniary penalty is linked to turnover in Hong Kong only, the future Tribunal will not be able to impose pecuniary penalty on those retailers who have been assigned to focus on the Shenzhen market under the market allocation agreement, as they have no turnover in Hong Kong. This is obviously not a desirable

outcome from the perspective of competition law enforcement.

Investment intention of multi-national corporations

5. As far as the Administration is aware, no multi-national corporation has indicated reservation to invest in Hong Kong owing to the lack of competition law. However, we believe that one of the key considerations of multi-national corporations which are eager to invest in Hong Kong rests on whether they need to face any market entry barriers, including in particular those artificially erected by incumbent local companies to hinder potential competitors from entering into the market. It is worth noting that the Competition Policy Advisory Group (COMPAG) has since its establishment in 1997 received numerous complaints alleging adoption of restrictive practices and the abuse of market power in various economic sectors. **Appendix I** contains brief description on a few relevant COMPAG cases.

6. Given that most of the major overseas jurisdictions already have a competition law in place for some years, we trust that the introduction of a cross-sector competition law in Hong Kong, which strives to provide a level-playing field for both local and foreign businesses, should be a welcome instead of a discouraging development from the perspective of foreign companies which intend to run or expand their businesses in Hong Kong.

Questions raised by the Hon Leung Kwok-hung

(a) Objective of legislation

7. The long title of a Bill is required by Rule 50 of the Rules of Procedures of the Legislative Council to set out the purpose of the Ordinance in general terms and to define the scope of the Ordinance. On this, we consider that the current long title of the Bill already completely and adequately describes the objects of the Bill contained in the substantive clauses which is to prohibit conduct that prevents, restricts or distorts competition in Hong Kong; to prohibit mergers that substantially

lessen competition in Hong Kong; to establish a Competition Commission and a Competition Tribunal; and to provide for incidental and connected matters. Furthermore, we note that Rule 58(9) of the Rules of Procedure of the Legislative Council stipulates that "*if any amendment to the title of a bill is made necessary by an amendment to the bill, it shall be made at the conclusion of the proceedings detailed above, but no question shall be put that the title (as amended) stand part of the bill; nor shall any question be put upon the enacting formula*". Having considered Rule 58(9) and our legal advice, we consider that the augmentation is not necessary unless there is a change in the scope of the Competition Bill (the Bill) arising from amendments to the substantive clauses which make it necessary.

(b) Amendment to section 1(a)(ii) of Schedule 1

8. Section 1 of Schedule 1 to the Bill provides for a general exclusion from the first conduct rule in respect of any agreement that enhances or would likely enhance overall economic efficiency, i.e. where the gain from economic efficiency is greater than the anti-competitive harm. We consider that this particular section as currently proposed already sufficiently captures the rationale of granting exclusion on economic benefit grounds. Furthermore, as mentioned in our earlier reply (CB(1)847/10-11(01)), we are concerned that adding the phrase "allowing consumers a fair share of the resulting benefit" into this section will introduce uncertainties for the business sector, especially SMEs, in their self-assessment under the general exclusion mechanism.

(c) Addressing the concerns of SMEs

9. We understand that many stakeholders, in particular SMEs, wish to know as soon as possible how and in what form the "de minimis" approach will be implemented under the proposed law. As explained in our earlier submitted discussion paper (CB(1)637/10-11(02)), international experience suggests that regulation of SME conduct is seldom a priority of competition authorities. We consider that the approach of deferring to the future Commission to set out the details of any "de minimis" arrangements in the regulatory guidelines during the

transitional period should largely meet SMEs' wish to have a clearer understanding on the "de minimis" approach before the competition rule comes into effect. This approach would also provide sufficient flexibility for the Commission, upon consultation with the public, to devise a "de minimis" approach that best fits Hong Kong's actual needs and to cater for variations in different sectors or changes in market circumstances over time. Whether the "small agreement" approach as adopted by the United Kingdom (UK) is appropriate for Hong Kong or could address SMEs' concern would need further deliberation.

(d) Appointment of SME and consumer representatives as Commission members

10. Paragraph 2 above has explained our policy intent in respect of the appointment of Commission members with expertise or experience in SMEs.

11. Regarding the appointment of consumer representatives, it is worth noting that the future Commission, unlike the UK Office of Fair Trading and the Australian Competition and Consumer Commission, will not have responsibilities over pure consumer protection issues, many of which are outside the coverage of the Bill. Moreover, the meaning of consumer representatives is unclear, noting that everybody must have some experience of being a consumer and therefore can claim to be representing consumer interests. The resulting uncertainty is not desirable from the perspective of ensuring effective implementation of the new law. As enhancing consumer welfare is one of the intended outcomes of a competition law, the future Commission members will need to pay due regard to this aspect while performing the functions of the Commission.

Advice sought

12. Members are invited to note the contents of the paper.

Commerce and Economic Development Bureau
January 2011

Appendix I

COMPAG complaints on restrictive practices and abuse of market power

Case description	Economic Sector
Complaint against a telephone service provider for preventing its client to switch to other service providers In March 1999, a company lodged a complaint to COMPAG that its Private Automatic Branch Exchange telephone service provider had refused to release the "password" for access to the central processor of the company's telephone system, hence preventing the company from acquiring maintenance service for its telephone system from other service providers. The Office of the Telecommunication Authority subsequently contacted the service provider concerned which then agreed to release the "password" to the complainant.	Telecommunications
Provision of Government Electronic Trading Services (GETS) Global e-Trading Services Limited (Ge-TS) lodged two complaints against Tradelink Electronic Commerce Limited (Tradelink) on 23 March and 26 August 2005 respectively about alleged anti-competitive conduct in the GETS market. There were three major allegations in the complaints – (a) Ge-TS alleged that Tradelink's exclusive agreements with Government Approved Certification Organisations (GACO Contracts) prevented the GACOs from cooperating with other GETS service providers and allowed Tradelink to maintain its monopoly in the provision of the Certificate of Origin (CO) service; (b) Ge-TS alleged that Tradelink sought to maintain its dominant share in the GETS market by offering low prices selectively to companies which were Ge-TS' marketing targets, while charging companies that were not such targets a much higher price. It also alleged that Tradelink locked in major traders by virtue of the exclusive contracts it held for Dutiable Commodities Permits (DCP) and Import and Export Declaration (TDEC) services; and	Trading (GETS market)

Case description	Economic Sector
(c) Ge-TS alleged that Tradelink attempted to maintain its monopoly in the GETS market after 2004 by soliciting the withdrawal of the bid by OnePort GETS Ltd and the withdrawal of GACOs from GACOlink Limited in the 2002 GETS tender exercise. On the first allegation, the then Commerce, Industry and Technology (CITB) found that certain provisions in the agreements between Tradelink and GACOs **appear to have the effect of fettering the statutory functions of GACOs** and **restraining competition in the provision of CO services.** Hence, it reminded GACOs of their statutory duties under the Protection of Non-Government Certificates of Origin Ordinance (Cap 324) and wrote to Tradelink, asking it to procure appropriate amendments to the GACO Contracts. Tradelink took action to clarify and rectify the GACO Contracts with respect to CO services. CITB found no prima facie evidence to substantiate the second and third allegations, on the basis of the information made available to the Government.	
Complaint against two local Wedding Expo Organisers In February 2006, a Taiwan-based wedding photography company registered in Hong Kong made a complaint to the COMPAG Secretariat that two wedding expo organizers had refused to allow it to participate in exhibitions held at the Hong Kong Convention and Exhibition Centre (HKCEC) in 2005 and early 2006 under pressure from other wedding photography companies. It also alleged that the organisers had restricted participating companies from promoting wedding photography services offered in Taiwan and the Mainland. The then CITB investigated these complaints, but found **no conclusive evidence that the conduct of the two wedding expo organizers amounted to anti-competitive behaviour** that had the effect of limiting access to and contestability in the wedding services market. It further noted that the complainant had participated in wedding expos in late 2006. However, CITB considered that the criteria used by the two	Professional service (exhibition)

Case description	Economic Sector
wedding expo organisers in selecting exhibitors lacked transparency, and drew their attention to the Statement on Competition Policy.	
Alleged anti-competitive practices by supermarket chains in the retail distribution of rice In May 2006, the Legislative Council (LegCo) Panel on Commerce and Industry discussed the regulatory arrangements for the import of rice and the reserve stock requirement under the Rice Control Scheme (RCS). At the meeting, an industry representative remarked that rice traders were aggrieved that supermarket chains had engaged in anti-competitive practices, such as selling rice below cost but added that they had no evidence that unfair conditions were imposed. The then Commerce, Industry and Technology Bureau (CITB) and the Trade and Industry Department met industry representatives to gather information on the allegation. The CITB also conducted a review to ascertain whether supermarket chains had sold rice below cost with a view to driving out competition, or had suppressed the retail price of rice to the extent that customer welfare and choices might be jeopardised. The CITB found no conclusive evidence of such conduct. Furthermore, the CITB noted that – (a) prices at supermarkets appeared to be on a downward trend since 2001; (b) import prices had increased in 2003 and 2004; and (c) the number of registered rice stockholders increased from 52 at the end of 2002 to 94 at the end of 2005. This information suggests that more choices and lower prices resulted from increased competition in the rice market.	Retailing
Alleged anti-competitive conduct by a supermarket In August 2006, a supplier (the Supplier) lodged a complaint that a supermarket (the Supermarket) had engaged in	Retailing

Case description	Economic Sector
anti-competitive conduct. Specifically, the Supplier claimed that – (a) the Supermarket had unilaterally raised the retail price of the Supplier's products above an agreed level; and (b) after displaying the Supplier's products for only a few months, the Supermarket had removed them from its shelves upon the launch of similar products under its own brand name, despite the Supermarket's earlier indication that the fee paid by the Supplier covered a one-year period. COMPAG referred the case to the then Commerce, Industry and Technology Bureau (which has become the Commerce and Economic Development Bureau after re-organisation on 1 July 2007), which commissioned the Consumer Council ("the Council") to investigate the complaint. The Council examined the complaint with reference to its previous studies on the supermarket sector, relevant overseas experience and the guidelines set out in the Government's Statement on Competition Policy. However, the Council encountered difficulties in examining the complaint thoroughly due to the limited information provided by the Supplier. Furthermore, it could not interview the Supermarket to assess the reason behind the practices without exposing the complainant's identity. As a result, the Council was unable to approach the supermarket for verification of the allegations made by the complainant. No evidence was found that the Supermarket placed impediments on the complainant, which could prevent it from supplying to other outlets, or for the purpose of substantially lessening competition. It could not be concluded that the Supermarket's behaviour amounted to anti-competitive conduct that has the effect of limiting market accessibility or contestability and impairing economic efficiency.	